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Case No. 67, Original

In The SUPREME COURT Of The UNITED STATES

October Term, 1982

STATE OF IDAHO ex rel. CECIL D. ANDRUS, Governor, WAYNE L. KIDWELL, Attorney General, JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATES OF OREGON and WASHINGTON,

Defendants.

DEFENDANT STATE OF WASHINGTON'S RESPONSE TO IDAHO'S EXCEPTIONS RE MASTER'S FINAL REPORT

KENNETH O. EIKENBERRY
Attorney General

EDWARD B. MACKIE
Chief Deputy
Attorney General

JAMES JOHNSON
Senior Asst. Attorney General
Attys.for Defendant
State of Washington

Office and Post Office Address:
Temple of Justice
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I. STATEMENT

The Defendant State of Washington respectfully submits that this Court should accept the recommendation of the Special Master that this action be dismissed. The Special Master has considered testimony which was submitted in January, 1978, and June, 1981, as well

as numerous exhibits, stipulations, briefs and arguments in reaching his conclusion that Idaho has not proved an injury entitling it to any relief in this proceeding.

II. INTRODUCTION

A. Prior Proceedings

The State of Idaho, when it sought permission to commence this suit, requested (1) admission to the Washington-Oregon Compact (40 Stat. 515) which regulates the fishery in the Columbia River and (2) an "equitable portion" of the fishery in the Columbia River which would be destined to return to the State of Idaho. This Court in response to that request ruled:

> "It having been concluded that the court has original and exclusive jurisdiction of this case to the extent that the complaint prays that the Court declare the State of Idaho is entitled to an equitable portion of the upriver anadromous fishery of the Columbia River basin and that the court determine Idaho's equitable portion based on the evidence and award costs and

> appropriate incidental relief, the motion for leave to file is hereby granted to that extent." (429 U.S. 163)

Subsequently this Court on June 6, 1977, (431 U.S. 952) appointed the Honorable Jean Sala Breitenstein as Special Master for further proceedings.

After an evidentiary hearing, briefs and argument, the Special Master issued a report and supplemental report, February 2, 1979, concluding:

(1) "The question of whether a state may maintain an original action for the apportionment of a migratory fish run is one of first impression and should be decided after trial on the merits, not on the pleadings." (Report, p. 17)

(2) "The United States is an indispensable party to these proceedings and the case cannot proceed without the joinder of the United States." (Report, p. 4)

Subsequently this Court, Idaho ex

rel. Evans v. Oregon and Washington, 444 U.S. 380, (1980), reversed the Special Master's conclusion that the United States was an indispensable party and remanded for further proceedings, stating with reference to the State of Idaho:

> "It now must shoulder the burden of proving that the nontreaty fisheries in those two states have adversely and unfairly affected the number of fish arriving in Idaho. A trial on the merits may well demonstrate that the target fisheries have, in fact, had no effect upon the runs of anadromous fish at issue here. Alternately, a trial may demonstrate that natural and man-made obstacles will prevent any additional fish allowed to pass out of zone 5 from reaching Idaho in numbers justifying additional restrictions on nontreaty fisheries in Oregon and Washington." Supra at 392.

Trial was held on the merits before the Special Master on June 15-18, 1981.

The Special Master, after having considered the evidence submitted, concluded:

> "That Idaho has not proved an injury entitling it to any relief." (Report, p. 36)

and further:

> "Nothing in the record suggests that Oregon and Washington have acted in bad faith." (Report, p. 35)

B. Subject Matter of the Dispute

The Columbia River system extends into the States of Washington, Oregon, Idaho, Wyoming and the Canadian province of British Columbia (see Report, Enc. 1). The river is utilized for a number of purposes, including the generation of hydroelectric power, irrigation, navigation and fish production. The river system is inhabited by a number of fish varieties including anadromous fish which spawn in fresh water and migrate to salt water, where they spend from one to four years. After obtaining adulthood, the anadromous fish seek to return to the fresh water of their origin.

When these fish leave their native waters they are smolts approximately six

inches in length and weighing approximately 1/10th of a pound. (Tr. 784-85) After growing and obtaining adulthood in the Pacific Ocean, the spring chinook returning to the Columbia River average 15 pounds with most in the range of 13-17 pounds. (Tr. 1041).

The three particular runs of anadromous fish for which Idaho has asserted a claim in this litigation are the following Snake River stocks: Upriver spring chinook salmon, upriver summer chinook salmon, and summer steelhead trout.

1. Spring Chinook

Spring Chinook enter the Columbia River as two major runs. The lower river run, which consists of fish originating from areas below Bonneville Dam, occurs from February through April, with the peak abundance being in late March. The other major Spring Chinook run is the upriver Spring Chinook, which passes through the lower river in April and May (Exhibit W-4, p. R-23). These upriver Spring Chinook are destined for locations

above Bonneville Dam and include both fish from the Snake River and from the upper portions of the Columbia River. These stocks are mixed while they pass through the lower Columbia. During the months of April and May upriver and lower river Spring Chinook are mixed in the river below Bonneville Dam. A fishery at that time may include a harvest of both lower and upper river runs, which upriver segment consists of both Snake River and upper Columbia River fish. The lower river Spring Chinook runs are progressing satisfactorily and are available for harvest. (Tr. 1042).

When upriver Spring Chinook are present in the lower Columbia River there is also present sturgeon which are available for harvest. (Tr. 723). There is also some overlapping of the Spring and Summer Chinook runs. (Tr. 724).

Since 1974, except for 1977, there has not been a commercial harvest of upriver Spring Chinook salmon in the Columbia River by non-Indian fishermen. (Tr. 1026). The 1977 fishery consisted

of a small gillnet fishery in May, 1977, harvesting 9,300 fish, and a controlled sports fishery. (Tr. 1039). In that year less than one-half of those harvested fish would have been seeking to return to the Snake River.

2. Summer Chinook

Summer Chinook return from the Pacific Ocean to the lower Columbia River from late May through July. This upriver run is of very low abundance since the natural spawning habitat for Summer Chinook were areas which have been inundated by dams. (Exhibit W-4, p. R-24; and Tr. 166) Since 1964 commercial fishing for Summer Chinook has been prohibited by Washington and Oregon in the Columbia River (Exhibit W-1, p. 20)(Tr. 1049) (Pretrial Order # 24). Restrictions have been imposed on other fisheries to minimize the incidental catch of Summer Chinook. (Exhibit W-4, p. R-24)

When the Summer Chinook are present in the lower river, there is some overlap

with the Spring Chinook run (Tr. 724). Shad and sturgeon which are harvestable fish in the Columbia River also are present when the Summer Chinook run occurs in the Columbia River. (Tr. 723)

3. Summer Steelhead

Summer Steelhead are principally an upriver fish, but there are some runs in the lower river tributaries. They enter the lower Columbia in June with the major segments of the upriver run peaking in July and early September. (See Exhibit W-11, Plate 12) Steelhead are designated as a game fish in both Oregon and Washington and non-Indian commercial harvests are not permitted. (Exhibit W-4, p. R-24). In 1975 and 1976 the sports fishery was closed in the lower Columbia to protect the Summer Steelhead run (Tr. 132). In what was considered to be a normal fishing year the sports catch in the lower Columbia reflects a harvest of approximately 7,000 Summer Steelhead from a run size of 150,000 (Tr. 133). The last year in which a harvest of that magnitude occurred was 1973. (Report,

p. 19, Table 6)

From 1975 through 1980 the largest annual catch of Summer Steelhead in Oregon and Washington was 4,400 in 1977. (1975 - 0;1976 - 0; 1978 - 2,700; 1979 - 1,800 and 1980 - 2,300) (Report, p.19) The Idaho harvests for the same years were 1975 - 0; 1976 - 2,000; 1977 - 13,000; 1978 - 11,500; 1979 - 5,500; and 1980 - 9,500. (Report, pp. 19, 51, Appendix C)

When Summer Steelhead are present in the Columbia River, there is an overlap with Fall Chinook, Coho, Shad and Sturgeon. (Tr. 723)

C. The Dams

The parties in this litigation agreed:

> "The most significant cause of decline of Idaho-origin spring chinook, summer chinook, and summer steelhead has been the construction and operation by the United States government of hydro-electric projects on the Columbia River and Snake River

> together with the licensing by the federal energy regulatory commission of other projects on the Snake River constructed by non-federal utilities." (Pretrial Order-Admitted Fact No. 25)

The Master's Report, enclosure II, identifies the dams and the dates of construction. Fish migrating from the Pacific Ocean to the State of Idaho encounter Bonneville Dam (1938), The Dalles (1957), John Day (1967), McNary (1953), Ice Harbor (1961), Lower Monumental (1967), Little Goose (1968), Lower Granite (1969). After the fish enter the State of Idaho they encounter Dworshak (1971), on a tributary of the Clearwater, and lastly there is a complete blockage of fish passage by Hells Canyon (1967).

The magnitude of the mortality caused by these dams vary by water conditions. Downstream juvenile fish migration losses from all causes average 15% to 20% at each mainstem dam. Mortalities have ranged as high as 30% under particularly adverse conditions at

individual dams. (Ex. W-3, p. 6) The mortality of downstream migrants may reach 95% in low water years. (Ex. W-4, p. A-15)

The mortality for adult fish returning from the Pacific Ocean can reflect a 15% mortality at each dam. (Ex. W-3, p. 7) The problems of fish passage have become more acute in recent years by virtue of the dam construction occurring in the late 1960's and the increase in the numer of operating turbines during the 1970's. On the Snake River, Ice Harbor, Lower Monumental, Little Goose and Lower Granite were all constructed during the 1960's. However, from 1968 to 1979 the number of operating turbines in those dams increased from 3 to 24 (Ex. O-24, p. 5) and the increased the quantity of water being used to drive such turbines substantially increases fish mortality. (Tr. 127)

Idaho, in its response to the Master's Report on the indispensability of the United States, stated to this Court:

> "Other related factors such as management of ocean harvest, operation of the dams, and land management are not material to the issue of equitable apportionment." (Br. p. 23)

Idaho orally advised this Court on November 26, 1979:

> "The Master was concerned with the adequacy of the judgment on three factors: The operation of eight dams along the Snake and Columbia Rivers by the Corps of Engineers; on the Indian trustee status relationship to fishing rights in general; and third, on the United States government control and management of the specific fishery.
>
> "Question: You are willing to take your chances on all of those, aren't you? I take it your narrow focus is just to have a greater escapement above Bonneville.
>
> "[Idaho] Your Honor, we are willing to take our chances." (p. 12-13)

However, in subsequent proceedings Idaho has taken the position that the

upstream fishery losses that occur by virtue of these dams should be equally shared by all three states even though the fishery in Washington and Oregon is below the first dam and Idaho's fishery is beyond the eighth.

Rather than being willing to "take their chances" on dam mortalities, Idaho wants Oregon and Washington to share the consequences of such losses even though they occur after the fish have passed the lower Columbia where the principal Washington-Oregon harvest occurs. By ignoring this fish passage loss the Idaho brief, pp. 27-29, 53-54, setting forth harvest totals substantially distorts a "real" comparison of the harvests in the repective states. We refer to such comparisons as a "distortion" because they do not reflect the number of fish which must be permitted to pass the downstream harvest in Oregon and Washington to produce one fish in the State of Idaho. During the period from 1975-1980, the lowest ratio for spring chinook was in 1978 when it only required 3.2 fish at Bonneville in the lower river

to produce 1 fish in Idaho, whereas the highest ratio was 1980 which required 11.1. For summer chinook in the same period, the lowest ratio was in 1978, being 3.6, whereas the highest ratio was in 1979 being 9.5. For steelhead the lowest ratio was in 1977, 3.6, and the highest ratio in 1976 being 5.3. These numbers have been computed from the tables contained in the Master's Report, pp. 18-19, calculating the ratio between the Lower Granite count, whch is the last dam on the Snake River before reaching Idaho, with the Bonneville count, which is the first dam on the Columbia River. These ratios reflect both the consequences of passage mortality and various destinations of the fish making up the upriver runs.

III. ARGUMENT

A. Summary

Idaho has taken an interesting posture in this litigation, asserting a new and novel right; i.e., claiming a protectible interest in a migratory resource, which interest is to restrict

its sister states from exercising their normal and accustomed powers with reference to a natural resource within their boundaries. Starting from the "assertion" of such right, Idaho quickly jumped to an assumption of the existence of the right for which they have not shown any jurisprudential antecedents. Idaho has mistakenly assumed that since the original complaint was concluded to have stated a justiciable controvery that it therefore followed that the claim had merit.

The Special Master at the outset of the evidentiary hearing on June 15, 1981, stated:

> "I held your complaint stated a justiciable controversy. As I understand the decision of the Supreme Court, I was sustained on that. Of course, there is a difference between the statement of a claim in a complaint and the proof of that claim." (Tr. 610)

Idaho rather than "proving" its claim simply assumed that its "right" was what Idaho defined it to be and then, using that definition, looked to see if the

same had been met.

The self-characterized right was that after the Indian harvest and necessary escapement for perpetuation of the species Idaho should "receive that portion of the harvestable surplus of Idaho-origin fish equal to the proportion of Idaho's contribution to the total upriver run of each species. In determining the number of harvestable fish, dams passage losses should be divided equally among the parties." (Idaho Br. 1982, pp. 35-36)

This is in marked contrast to what Idaho told this Court on November 26, 1979:

> "Your Honor, what we are seeking in this matter is two things:
>
> "First of all and foremost of all, to have a large enough escape come up the river to preserve the species.
>
> "And second, and only secondarily, a reasonably limited sports fishery in Idaho." (p. 25)

Idaho had the burden to establish, first, that it possesses a legal or equitable right to the migratory fishery resource. Second, Idaho had to prove that the nontreaty fisheries in the Columbia River in Oregon and Washington have adveresely and unfairly affected whatever equitable or legal right Idaho may have. Idaho ex rel. Evans v. Oregon, 444 U.S. 380, 392 (1980).

Before this Court's extraordinary power should be invoked to control the sovereign conduct of the States of Washington and Oregon in managing the fishery resource, Idaho had the obligation to establish by clear and convincing evidence that there is a threatened invasion of rights which must be of a serious magnitude. New York v. New Jersey, 256 U.S. 296, 309 (1921). The State of Idaho has been given a full opportunity to present legal and factual contentions to prove its claim, but Idaho has failed to sustain its burden in any of those particulars. The reason for the failure to sustain the factual burden is obvious; that is, the States of

Washington and Oregon have, and are continuing to, managed reasonably the fishery resources within the Columbia River in a manner so as to protect the resource and, when there are harvests available, they occur not only in the lower Columbia River but also within the State of Idaho.

The Special Master, while considering historical information, gave prime consideration to the information of the most recent decade and particularly the last five years, which reflects present conditions that have resulted from the impact of the operations of the dams on the Columbia and Snake Rivers. Counsel for the State of Idaho advised the Special Master on April 30, 1981:

> ". . . Establishment of the decree at this time based upon what the Court determines to be the present conditions would probably be the most efficient way to proceed with the vagaries of a natural resources such as upriver salmon and steelhead. . . " (Tr. 579)

B. Novelty of Idaho's Request

The State of Idaho contends it is entitled to all or a specific portion of the harvest of migratory fish which commence their life cycle in the State of Idaho. With reference to three of the fish runs in the Columbia and Snake Rivers (upriver spring chinook, upriver summer chinook, and summer steelhead), Idaho has sought to limit the authority of its sister states, Washington and Oregon, earlier admittees to the Union, in their management of the fishery resource in the Columbia and Snake Rivers. This extraterritorial assertion of a "right" is novel and unprecedented.

1. Wildlife Cases

In support of its claim, Idaho has attempted to turn on their "head" decisions made by this Court concerning a state's regulation of wildlife, conflict of such regulations with the privileges and immunities clause, Article IV, § 2 of

---

1 The Idaho Brief, p. 43, states that the "factual realities of the river system" do not comport with the possibility of Idaho producing 100% of a fish run, yet on p.26, Table I, Idaho claims to have produced 98% of the summer steelhead in 1968.

the United States Constitution, and the commerce clause Article I, § 8. (Idaho's 1981 Brief, p. 21, 43-46).

For a number of years, commencing with Geer v. Connecticut, 161 U.S. 519 (1896), this Court upheld a state's management and control of wildlife on the theory that the state held an "ownership" interest in the wildlife on behalf of the citizens of the state. It must be emphasized that in Geer the question was the control by the State of Connecticut of wildlife within the boundaries of Connecticut. Subsequently, in Missouri v. Holland, 252 U.S. 416, (1920), the court rejected the contention of the State of Missouri that the federal government could not, acting in accordance with an international treaty, exercise some control over migratory birds when they were within the State of Missouri. After noting that the birds were only transitorily within the State of Missouri, and had no permanent habitat therein, the court specifically rejected the contention that Missouri could exercise exclusive authority by virtue of

an assertion of title to the migratory birds. Supra at 434. Again, the question presented in Missouri related to the nature and extent of the authority of the state to control and regulate the resource within its own boundaries.

A short time later in Lacoste v. Dept. of Conservation, 263 U.S. 545 (1934), the Louisiana severance tax for fur-bearing animals and alligators was upheld. The decision was based on the "ownership concept" again emphasizing the extent of a state's authority with reference to wildlife "within its borders." Supra at 549.

More extensive consideration should be made of Toomer v. Witsell, 334 U.S. 385 (1948), which concerned a migratory resource. The State of South Carolina imposed substantially higher fees and greater restrictions on nonresident commercial fishermen for shrimp than on residents of the State of South Carolina. The shrimp themselves were of a migratory type, migrating through the waters of several states and

are off the coast of South Carolina only temporarily. Supra at 401. This court observed:

> "Most of the shrimp in this area are of a migratory type, swimming south in the late summer and fall and returning northward in the spring. Since there is no federal regulation of the fishery, the four states most intimately concerned have gone their separate ways in devising conservation and other regulatory measures." (Supra at 388)

While making this observation, this court in no way concluded, nor even intimated, that the four states were inhibited in any manner in managing the migratory resource when it was within their geographical boundaries in the absence of federal preemption such as that found in Missouri v. Holland, supra. The particular statutes implemented by the State of South Carolina which discriminated against nonresidents were found to be in violation of the privileges and immunities clause for restricting nonresident commercial activities. The Toomer case thus reduced

South Carolina's bars to nonresident commercial shrimp fishermen, but did not intrude upon the sovereign authority of South Carolina to determine what fishing regulations would apply to all shrimp fishermen within its jurisdiction.

All these cases relied upon or gave substantial deference to the legal theory that the state had an "ownership" interest in the resource. However, in all of those decisions the "ownership interest" was invoked to consider the validity of regulations created and enforced within the jurisdictional limits of the state in question.

More recently, this court retreated from the "ownership" concept of Geer v. Connecticut, supra. A reexamination of the "ownership concept" was made in Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977). This change in legal theory is important in the instant proceeding. If a state has a "ownership interest" in a resource, an argument might be framed that "ownership" forms a legal foundation for a state to protect

that ownership interest in the res even when the res is outside the boundaries of the state. As we have indicated, prior cases only used that theory for the purpose of examining the state's exercise of control within its own boundaries. Elimination of the "ownership" theory effectively precludes the use of that theory to expand a state's interest beyond its own borders. The majority opinion in Douglas stated:

> "A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk about 'owning' wild fish, birds, or animals. . . . The 'ownership' language of cases such as those cited by the appellant must be understood as no more than a 19th-Century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" (Supra, at 284).

In Douglas, the Virginia statute limiting nonresidents and aliens in the harvest of fish within Virginia was invalidated on the basis of a conflict with a federal statute. The fishery

involved menhaden, a major east coast fishery which migrates up the east coast with estuaries in Chesapeake Bay being an important nurturing grounds. Supra at 269, footnote 3. The court, while recognizing the migratory nature of the menhaden tish, again neither concluded nor even intimated that there was any restriction upon the sovereign authority of the State of Virginia to regulate the harvest within Virginia. The infirmity in the Virginia statute was the exclusion of nonresidents and aliens who were permitted to fish by federal law.

If the Idaho contention here asserted is accepted, it would reasonably follow that the State of Massachusetts could limit the authority of Virginia to regulate the harvest of menhaden because the fish migrate to and from the State of Massachusetts. Such an approach would increase rather than decrease the "balkanization" of the menhaden resource. Douglas, supra at 286. The answer to providing access to a migratory resource is, as reflected in Douglas, to permit the interstate movement of commercial

fishermen. There is no need to invoke a judicial supervision of the states' exercise of their sovereign authority in managing the migratory fishery resources within their boundaries.

The rejection of the state wildlife ownership theory for wildlife was made express in Hughes v. Oklahoma, 441 U.S. 332 (1979), wherein the theory as articulated in Geer v. Connecticut, supra, was specifically overruled.

In the instant proceeding Idaho has indicated there is no commercial harvest of the fishery resource within Idaho with the fishery being solely for sports and recreational purposes. For the purpose of the constitutional privileges and immunities clause, sports and recreational purposes have been accorded a lower status than a commercial fishery. In Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1979), this court observed that hunting was for sports and recreational purposes and did not reflect a livelihood for the nonresident hunters, then concluding:

> "Equality in access to Montana elk is not basic to the maintenance of a well-being of the Union." (Supra at 386)

Further, this court stated:

> "And a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause." Supra at 386.

The constitutional right being protected is that of a nonresident for activities within a state. It is not a "right" which is vested in the nonresident's state. In this proceeding, it is, of course, the nonresident state, Idaho, which is asserting a nonresident "right." Such a "state right" has no antecedents in any of the wildlife cases.

2. Water Right Cases

Idaho has not taken exception to the conclusion of the Special Master that the interstate water apportionment cases such

as Nebraska v. Wyoming, 325 U. S. 589 (1945); Colorado v. Kansas, 320 U.S. 383 (1943); Wyoming v. Colorado, 259 U.S. 419 (1922); and Kansas v. Colorado, 206 U.S. 46 (1907), do not by analogy form a basis for the right here sought by the State of Idaho. (Report, p. 24) In water rights law the rights within the respective states are in the nature of a property interest, whether based upon a riparian or appropriation theory. The holder of water rights has the right to use the quantity of water reflected by the right in accordance with the priority of the same with reference to other holders of water rights. Water right adjudications between states are the means by which property interests within the respective states are harmonized and coordinated with water rights in adjoining states. In contrast, with reference to wild animals and fish there are no holders of property rights in the resource. As this court recently observed in Hughes v. Oklahoma, supra, at 334:

> "A state does not stand in the same position as the owner of a

> private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds or animals."

In the absence of individually held rights as exist in water law, it is neither necessary nor appropriate to create a federal common law of wildlife "rights" comparable to water law since there are no property rights which require harmonization and coordination between the sister states.

3. Natural Resource Cases

The Special Master found that the legal genesis for an Idaho interest in the migratory resource derived from West v. Kansas Natural Gas Co., 221 U.S. 229 (1911); Pennsylvania v. West Virginia, 262 U.S. 553, 599-600 (1923); H. P. Wood & Sons, Inc. v. Dumond, 336 U.S. 525 (1949); and New England Power Co. v. New Hampshire, ___ U.S. ____, 102 S. Ct. 886 (February 24, 1982). In each of those cases and also in Hughes v. Oklahoma, 441 U.S. 322 (1979), the question presented was whether private persons and entities

could be precluded by a state from shipping and selling in interstate commerce products which had been produced or extracted within the boundaries of the state seeking to restrict the movement of the same. The Idaho 1982 brief, p. 95, agrees with that characterization of those cases. Most recently, in New England Power Co., supra (at 50 L.W. 4225), quoting from the recent decision of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978):

> "We reiterate 'these cases stand for the basic principal that "a State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the grounds that they are required to satisfy local demands or because they are needed by the people of the state."'"

This court further stated that the commerce clause:

> ". . . precludes a State from mandating that its residents be given a preferred right of access, over out-of-state customers, to natural resources

> located within its boundaries or the products derived therefrom." (Id)

These cases, including the most recent statements in New England Power Co., emphasize the concern is with reference to access to natural resources within states and the ability of individuals and private concerns to remove those resources from a state, placing the same in interstate commerce. The products which are being placed in interstate commerce reflect materials or products produced by individuals or businesses including the extraction of natural resources. None of those cases, however, restrict the authority of the state to deal with resources within its boundaries provided it does not discriminate between residents and nonresidents, or domestic or interstate shipment of the same.

We respectfully submit these cases do not support the premise that the state as a matter of law is required to share with other states an interest in migratory resources. If there is any

such obligation it would arise solely as a matter of equity, and Idaho has failed factually to establish any such right to an equitable entitlement.

C. Historical Harvest

Idaho in its brief in numerous places (pp. 27-29, 33, 37, and 48) treats the fishery harvests in the Columbia River from 1962 to 1980 as representing a single historical era. While the Idaho approach has the simplicity of lending itself to "averages," it really substantially distorts the conditions and considerations that result in such annual harvests. The Special Master, recognizing the changes of conditions that have occurred from the construction and operation of the dams on the Columbia and Snake Rivers, has properly segregated recaps of statistical information on the fishery into the period of 1956-1970, 1971-1980, and as a subcomponent thereof 1976-1980. It should be noted and emphasized that the fishery summary data contained in the Report as Appendices A, B and C reflect the entire upriver run of

the respective species and therefore include substantial numbers of fish which neither originated from nor are destined to return to the Snake River or the State of Idaho.

The marked contrast between the period of 1956-1971 and the most recent decade is readily apparent from an examination of Appendices A, B and C to the Report.

For upriver summer chinook from 1956-1971 there were only three years in which the number of fish entering the Columbia River was less than 89,000, with the size of the runs ranging from 72,900 in 1970 to a high of 207,000 in 1957. Whereas, in the last decade there were only two years in which the returning number of summer chinook exceeded 52,000, those being 1971 and 1972, with 89,500 and 77,500 respectively. The range during that period was from a low of 31,100 to a high of 89,500.

The upriver spring chinook from 1956 to 1971 only had three runs of less than

147,000, whereas in the most recent decade (1971-1980) there have only been three years in which the run exceeded 147,000, none of which have occurred in the last seven years.

For summer steelhead from 1956-1981 there were only five runs which were less than 187,000, whereas in the most recent decade only four runs have exceeded that figure, and three of those occurred during the first three years of this decade.

During the periods in which there have been larger fish runs, the historical pattern, to which Idaho has never historically objected was that the major harvestable portion of large runs would be captured a commercial fishery. A commercial fishery can effectively capture fish which are available for harvest. These fish have a high commercial value when caught in the Lower Columbia River which in 1978 was identified as ranging from $60 to $90 per fish (Tr. 178-179, 181-182) and this commercial fishery was well established

prior to the commencement of this century. (Idaho Brief p. 11)

The sports or recreational fishery, on the other hand, is a more inefficient fishery in capturing fish. Thus, a sports fishery may be permitted on stocks that cannot sustain a commercial fishery and, conversely, a sports fishery may not be relied upon to harvest larger quantities of fish that are and should be available for harvest. Thus, for runs of larger magnitude that have a higher number of harvestable fish, commercial fisheries are permitted, and since those commercial fisheries occur in the lower Columbia River in such years, the downriver harvest is much greater than harvests occurring in the State of Idaho. A recognition of the viability of that approach historically when larger fish runs predominated is reflected by the Idaho Attorney General advising this Court during an argument on November 26, 1979, that what Idaho is seeking is "a reasonably limited sports fishery in Idaho." (P. 25) During the current decade with very few exceptions there has

been a relatively low rather than high abundance of harvestable fish from the upper river runs.

D. The Last Decade's Harvest

On pages 43 - 45 we have set forth summary information for the last decade with reference to upriver spring chinook, upriver summer chinook, and upriver summer steelhead. The sources of the information used in preparing the same are as follows:

(1) The column entitled "Entering Columbia River" identifies the full upriver run of the respective species that entered the Columbia River. This run consists of fish destined for a wide variety of places above Bonneville Dam, which is 130 miles from the mouth of the Columbia River. These numbers, therefore, reflect fish which are destined for locations other than Idaho but are present in the river at the same time as the fish which are seeking to return to the Snake River. The source of the respective numbers is the Master's

Report, Appendices A, B and C.

(2) The columns entitled "Oregon/Washington Harvest" and "Idaho Harvest" are directly taken from the Idaho Brief, Tables 2, 3, and 4, pp. 27-29. Those numbers thus represent Idaho's contention as to which portion of the lower river harvest represented a harvest attributable to fish of origin from the Snake River in Idaho.

(3) The column entitled "Bonneville/Ice Harbor Ratio" is a computation which has been computed with reference to information set forth in the Report, Appendices A, B and C for the respective species. Bonneville is the first dam which the fish encounter on their upriver migration. Ice Harbor is the first dam which fish encounter on the Snake River, which is the fifth dam in the upriver series. From 1975 to 1980 the ratio reflects passage at Lower Granite, which is the last dam on the Snake River prior to reaching the Idaho-Washington border. This ratio reflects the number of upriver fish of a

specific species which pass Bonneville Dam which is upriver of the Oregon-Washington fishing area, and that are required to produce one fish of that species in the Snake River if the ratio is with reference to Ice Harbor, or in the State of Idaho when the ratio reflects Lower Granite. That ratio reflects a combination of the passage effects on fish mortality and the mixed destinations of the upriver stocks.

The following specific comments have direct reference to specific elements of summary pages 43-45.

Upriver spring chinook (p. 43) in the first three years of the 1971-80 decade were years in which the abundance of the run clearly made it reasonable to have a substantial commercial harvest below Bonneville Dam. Since 1974 there has only been one year in which a commercial harvest was permitted, that being 1977. That commercial fishery in the lower river was a controlled, limited gillnet fishery of 9,300 fish (Tr. 1039). Further, as a consequence of the

curtailment and restricted fishery in the lower river in 1977, surplus spring chinook which otherwise could have been available to harvest were not harvested in the lower river and thus proceeded up to the Priest Rapids Dam on the Columbia River above the conflux with the Snake. A commercial fishery is not feasible at that location and the changes that occur in the body of the fish as it migrates upriver in fresh water deteriorates the commercial value of the same. (Tr. 1042)

For the upriver summer chinook (p. 44) there has not been a targeted commercial fishery on that species since 1964 (see Pretrial Order, Agreed Fact No. 24) The downriver harvests in 1971, 1972, and 1973 reflected in part a harvest which was incidental to the harvesting of other fish which were available in harvestable quantities but were intermixed at the time of harvest. The de minimus catch in 1977 and 1978 was described by Idaho's witness (Tr. 781) as being "jack salmon" which were not mature adults returning for spawning.

For the Idaho harvest an asterisk has been placed for the years 1971, 1972, 1973, 1974, 1977 and 1978. While Idaho lists 0 for those years by its Table 3 (Br. p. 28), the testimony of Idaho's witness (Tr. 724-28) was that when a spring chinook harvest occurs in Idaho there is some incidental catch of summer chinook. In all of the years above mentioned there was a spring chinook fishery in Idaho. While such harvests may be statistically de minimus, they do graphically illustrate the problem presented in harvesting harvestable fish stocks that are intermixed in time and space with fisheries that should not be harvested.

For summer steelhead (p. 45) in the last decade, it has been Idaho, not Oregon and Washington, which has taken the "lion's share". Further, it should be noted that in 1976 Idaho permitted a catch and release program for summer steelhead, which results in a high degree of mortality for such released fish. Idaho identified during that year to have had 1,996 fish so "caught and released"

in addition to the 2,000 catch identified on Table 4 of the Idaho Brief (Tr. 775-78). It is also interesting to note that Tr. 778 identifies the Idaho harvest for 1976 as being 2,247 rather than 2,000.

It is important to emphasize that the harvest comparisons here set forth are without reference to any passage losses that occur as the fish traverse past the eight major dams on the Columbia and Snake Rivers to return to the State of Idaho. Certainly no one can validly contend that these Washington and Oregon harvests have unfairly and adversely affected Idaho." Idaho, supra, 444 U.S. 380, 392.

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UPRIVER SPRING CHINOOK

Year	Entering Columbia River	Oregon/ Washington Harvest	Idaho Harvest	Bonneville/ Ice Harbor Ratio*
1971	168,000	22,525	3,500	3.9
1972	279,400	55,980	6,500	3.7
1973	232,900	63,560	9,500	2.3
1974	108,500	9,408	1,500	4.5
1975	104,100	0	0	5.9
1976	78,300	0	0	3.8
1977	143,600	12,532	3,500	3.1
1978	129,000	53	7,000	3.2
1979	51,400	0	0	6.8
1980	61,000	0	0	11.1

* From 1975-1980 this column reflects the ratio between Bonneville and Lower Granite.

UPRIVER
SUMMER CHINOOK

Year	River	Oregon/ Washington	Idaho	Bonneville/ Ice Harbor**
1971	89,500	7,772	*	2.9
1972	77,500	3,953	*	3.1
1973	52,400	1,295	*	3.6
1974	34,000	0	*	3.3
1975	44,400	0	0	5.2
1976	42,100	0	0	4.3
1977	41,200	60	*	4.9
1978	43,400	132	*	3.6
1979	34,400	0	0	9.5
1980	31,100	0	0	9.2

* See p. 41

** From 1975-1980 this column reflects the ratio between Bonneville and Lower Granite.

E. Idaho Habitat and Hatcheries

There is substantial available fishery habitat in the State of Idaho to support the natural production of spring and summer chinook salmon and steelhead. There are, however, limitations because only parts of a river or stream are available for spawning, (Tr. 745) and as Idaho's witness acknowledged, "stream habitat in many areas is being degraded by siltation, various forms of pollution, channel alterations, over-grazing of shore banks, diversion of water, and lack of maintenance flows." (Tr. 748) There is also a limiting factor in fishery production in Idaho by limitations on the availability of the rearing habitat, which is even more important than spawning habitat. (Tr. 952) There has also been the elimination of available habitat on the mainstem of the Snake River by the construction of Hells Canyon Dam in 1967, which created a complete blockage to fish passage.

For anadromous fish which are born in fresh water and migrate to salt water

where they achieve most of their growth to return as adult fish for spawning the next generation, the major factor which must be viewed is "ingress and egress." Idaho's expert testified that the survival rate of salmon smolts from Idaho which return as adult chinook is 72/100ths of 1%, which reflects 7 adult chinook salmon for 1,000 smolts. (Tr. 835, 784-785) For steelhead the stated returning ratio is even lower, being 32/100ths of 1%, reflecting only three adult steelhead per thousand smolt (Tr. 835). Idaho's expert testified with reference to the Idaho potential for fish production that in making his computations:

> "Question: But you tried to exclude, as best you can, the impact of the dams?
>
> "Answer: That's correct." (Tr. 961)

The Master correctly characterized that type of testimony by stating:

> "Evidence of natural conditions before the activities of man

> produced the dams which have depressed the fish runs is of no materiality." (Report, p. 26)

For the purposes of habitat production potential, the major consideration is ingress and egress, which is controlled by the dams on the Columbia and Snake Rivers. Washington, Oregon, federal agencies, and Idaho have cooperated in seeking methods and projects to ameliorate the passage problems that are presented by those dams, but the problems are the realities with which one must address the management of the fishery in the Columbia and Snake Rivers.

Idaho has made a number of references to hatchery production programs in Idaho (Idaho 1982 Brief, pp. 16-20, 44-45). We do not in any way denigate those efforts and programs but the evidence submitted to the Master places those efforts in perspective.

There are seven fish hatcheries located in the State of Idaho, but the

financial commitment by the state is not substantial. The Rapid River Hatchery is funded 100% by Idaho Power Company (Tr. 709, 789) as is the Phasimeroi Hatchery with the exception of some limited federal funds in 1979 (Tr. 710, 790). The Oxbow Hatchery is also financed 100% by Idaho Power (Tr. 792) the installation of which resulted from a federal energy regulatory commission proceeding participated in by Oregon, Washington and Idaho. The Kooskia Hatchery and the Dworshak Hatchery are funded 100% by federal funds. (Tr. 706, 707, 792-93) The only two facilities which involve Idaho state funds are the McCall Hatchery constructed by the Corps of Engineers at their expense, and the federal government pays for 50% of the operational expense. (Tr. 709, 791) The Hayden Creek facility is financed with 75% federal funds and only 25% state. While Idaho makes a number of references to hatchery production in its brief (pp. 16-20, 44-45), there is only one specific reference to production at a facility involving Idaho funds, that reference is to the Hayden Creek facility

(Brief, p. 19) That reference refers to an annual production of 500,000 - 600,000 spring chinook smolts per year, from a facility for which Idaho pays only 25% of the operating costs. If one factors total production by the 25%, Idaho contribution of cost, and considers the Idaho expert testimony with reference to rate of return of chinook salmon to Idaho as adults from smolt production, a 150,000 spring smolt production reflects 1,080 adult chinook per year.

In other references in Idaho's brief, there is an aggregation of total hatchery production expressed by combining smolts, fry, and fingerlings. Fish "fry" are the very young, small fish which may average approximately 500 fish to the pound. The next stage of the fish development is to reach the fingerling stage and subsequently the fish become referred to as "smolts." Smolts may range from 10 to 40 per pound. (Tr. 784-85) The testimony clearly indicates that there is a much higher survival rate for the heavier smolts than the small fry or fingerlings. (Tr. 785)

Thus, when combined figures are given, there is no effective way of factoring what adult fish production is represented by such hatchery figures.

IV. CONCLUSION

Burnell Bohn, a fisheries biologist for the Oregon Department of Fish and Wildlife, who is involved in the management of the Columbia River fish stocks, testified:

> "Q Mr. Bohn, in your opinion is there anything that the states of Oregon and Washington can do in setting their harvest regulations that would provide a greater level of protection for spring chinook and summer steelhead destined for the Snake River system?
>
> "A I would say not at the present time. We have basically attempted to protect essentially all of those fish in the depressed run years, and at this point I would say that I can't think of a great deal more that we can do in the regulatory area to protect those fish." (Tr. 1048)

While at first blush that statement might be considered to be "self-serving,"

we would submit the record in this proceeding demonstrates that the statement accurately reflects what has and continues to be done by the lower river states, Oregon and Washington, in managing the Columbia River fish runs.

The Master noted in the Report:

> "Nothing in the record suggests that Oregon and Washington have acted in bad faith." (P. 35)

Further, in conclusion the special Master stated:

> "Idaho has not convinced the Master that the imposition of any restrictions beyond those now self-imposed by Oregon and Washington will substantially increase the return of fish to it. Idaho has failed to show 'the high equity that moves the conscience of the Court in granting judgment between states.' Washington v. Oregon, 297 U.S. 517, 523." (Report, p. 36)

Litigation by its very nature tends to magnify the differences between parties and thus minimize or obscure the cooperative efforts. All three states

share a common interest in protecting and enhancing the upriver spring chinook, summer chinook and summer steelhead runs originating in the Snake River and its tributaries. (Pretrial Order Agreed Fact #16)

The joint cooperative actions of the three states for their mutual benefit has, and continues to occur on a regular basis. An example is the Idaho Power proceeding with reference to the construction of the Oxbow, Brownlee and Hells Canyon Dams on the Snake River where that river forms the boundary between the States of Idaho and Oregon. The three states participated with Oregon being very aggressive in obtaining mitigation for steelhead above Hells Canyon Dam during Phase 2 of the Idaho Power litigation. (Tr. 856) All of the hatcheries installed as a result of that mitigation package are located in Idaho, even though those facilities are designed to mitigate for fish losses which occurred in both Oregon and Idaho, and 68% to 70% of the spring chinook above Oxbow and Brownlee Dams were of Oregon

origin. (Tr. 989, 996) 63% of the steelhead above Hells Canyon, Oxbow and Brownley were of Oregon origin. (Tr. 1004)

The cooperation between the states has also been reflected by the use of Oregon fish for seed stock to create runs in Idaho, (Tr. 837) and Oregon fish stocks were also used for hatcheries in Idaho. (Tr. 987) On an on-going basis the Kooskia Hatchery in Idaho regularly obtains eggs from a federal hatchery in Washington. (Tr. 770)

The Washington/Oregon Compact, which regulates the fishery in the Lower Columbia River, has participation in an advisory capacity by representatives from Idaho. (Tr. 647-48, 1058) In addition to the Oregon/Washington Compact there is a Columbia River Fisheries Council, consisting of representatives from each of the three states, two federal agencies, and a representative of the tribes, which acts to coordinate matters of mutual interest and benefit in the fisheries management within the Columbia

Basin. (Tr. 651) There is also Idaho representation on Columbia Basin Fishery Technical Committees, which has representatives from each of the states and two federal agencies addressing itself to fishery management in the Columbia Basin. (Tr. 854)

All three states jointly worked with federal officials in formulating and attempting to implement the Lower Snake River compensation plan (Ex. O-2), which was authorized by Congress in 1976. (Tr. 820-821) That plan, advocated by all three states, reflects the construction of five hatcheries in Idaho, one in Oregon, and one in Washington. (Tr. 822) It also should be noted that when the Corps of Engineers failed to implement the Snake mitigation plan, Washington commenced litigation against the Corps which was not joined by the State of Idaho. (Tr. 842-43)

The variety of fish runs in the Columbia and Snake Rivers, the timing and overlapping of those runs, the differences in the destinations, the

impact upon the fishery resource by water flow conditions, the difficulty of accurately predicting an appropriate level for harvest and a variety of other factors make the management of the fishery resource in the Columbia River Basin a complex process. It is not a process that can be managed simply with reference to "averages."

Additional restraints on the management authority of the downriver states Oregon and Washington should not be imposed. We concur with the conclusion of the Special Master that Idaho has not presented a case to justify the imposition judicial controls. Idaho neither proved a right nor presented facts that "call" for the creation of some new and novel right to a migratory resource.

We respectfully submit that Idaho has not sustained its burden to show that "the threatened invasion of rights must be of a serious magnitude, and it must be established by clear and convincing evidence." New York v. New Jersey, 256

U.S. 296, 309 (1921). Nor has Idaho proven that the actions of Washington and Oregon have "adversely and unfairly affected the number of fish arriving in Idaho." Idaho, supra, at 392.

We respectfully submit that the Master's recommendation of dismissal should be accepted by this Court.

DATED this 13th day of December, 1982.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

EDWARD B. MACKIE
Chief Deputy
Attorney General

JAMES M. JOHNSON
Senior Assistant
Attorney General

Attorneys for Defendant
State of Washington

UPRIVER
SUMMER STEELHEAD

Year	River	Oregon/ Washington	Idaho	Bonneville/ Ice Harbor **
1971	224,100	14,444	17,500	2.9
1972	225,600	18,941	13,500	2.9
1973	187,800	10,608	10,500	4.1
1974	146,100	1,140	3,000	10.9
1975	84,100	0	0	4.9
1976	122,400	0	2,000*	5.3
1977	196,100	1,716	13,000	3.6
1978	105,000	972	11,500	3.4
1979	114,200	450	5,500	4.5
1980	129,200	1,104	9,500	3.0

* See p. 41

** From 1975-1980 this column reflects the ratio between Bonneville and Lower Granite.